

**RESPONSE TO “REQUEST FOR DISCOVERY, NOTICE OF DEFENSES AND REQUEST FOR NOTICE OF REBUTTAL WITNESSES”**

(This response was drafted in response to recent sweeping defense motions for discovery and attempts to deal with all of the defense’s requests.)

The State of Arizona, through undersigned counsel, in response to the above-captioned pleading and in compliance with Rule 15.1, Ariz. R. Crim. P., responds as follows to each numbered section of the pleading:

1. The names and addresses of each of the State’s witnesses, other than victims, are as follows:

Name, address

Name, address

(And so on for additional witnesses.)

[The names of the victim(s) are as follows:

Victim One

Victim Two

The address(es) of the victim(s) (is/are) withheld under Rule 39(10), Ariz. R. Crim. P.]

The Rules of Criminal Procedure do not require the State to make a specific disclosure of the telephone number[s] of the State’s witness[es]. If any telephone number[s] for the State’s non-victim witness[es] (is/are) available, the number[s] (is/are) included in the departmental report[s].

The written and oral statements of each of the witnesses are incorporated in the police reports. Those reports have already been provided to the defense at the preliminary hearing and/or at the arraignment.

(There are no known audiotapes or videotapes arising from this investigation.)  
OR (Duplicates of audiotapes and/or videotapes have been provided to the defense.)  
OR (The prosecution’s copy of each audiotape and/or videotape is available for defense counsel’s review by contacting this prosecutor to arrange a mutually-convenient time for such review.) OR (A duplicate of the prosecution’s copy of each audiotape and/or videotape will be produced for defense counsel when counsel provides the prosecutor

with a blank tape for each tape to be duplicated, or if defense counsel otherwise pays the reasonable costs associated with duplicating each item. [Prices go here.])

2. All statements of the defendant [and his/her codefendant(s)] are included in the police reports. Those reports have already been provided to the defense at the preliminary hearing and/or at the arraignment.

3. The name(s) and address(es) of any expert witness(es) the State believes will testify for the State at trial (is/are) listed under ¶ 1 of this response, above.

Results of physical examinations, scientific tests, experiments, or comparisons performed on any person or evidence concerning this case have been provided through discovery, or will be provided upon completion. If additional information becomes available, the State will promptly notify the defense and make a further disclosure as provided in Rule 15.6, Ariz. R. Crim. P.

The defense cites *Kyles v. Whitley*, 514 U.S. 419 (1995) for the proposition that the prosecutor has an “obligation to learn of existing exculpatory evidence.” But *Kyles v. Whitley* does not impose any such “obligation” on the prosecution; the prosecution is not required to investigate possible defenses on behalf of the defendant or to seek out possible defense witnesses. *Kyles v. Whitley* says that the prosecution must review the evidence in its possession, determine if any of it is exculpatory, and, if so, turn that evidence over to the defense. *Id.* at 437-38. Nor does Arizona law impose such a burden on the prosecution. “Generally, the State does not have an affirmative duty to seek out and gain possession of potentially exculpatory evidence.” *State v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987).

The State has reviewed the evidence now in its possession and has already turned over to the defense anything that is arguably exculpatory. If the State learns of any additional evidence that is arguably exculpatory, the State will make a further disclosure as provided in Rule 15.6, Ariz. R. Crim. P.

4. As set forth above, the State has already provided the defense with copies of the police reports in this matter.

(There are no known photographs arising from this investigation.) OR (Duplicates of photographs have been provided to the defense.) OR (The prosecution’s copy of each photograph is available for defense counsel to review and/or copy by contacting this prosecutor to arrange a mutually-convenient time for such review.) OR (A duplicate of the prosecution’s copy of each photograph will be produced for defense counsel upon payment of the reasonable costs associated with duplicating each item.)

Rule 15.1(a)(4), Ariz. R. Crim. P., requires the State to provide the defense with a “list of all papers, documents, photographs or tangible objects which the prosecutor will use at trial or which were obtained from or purportedly belong to the defendant.” The

State has already provided that list in its discovery notice. Defense counsel may examine the items on that list during the course of its preparation.

The defense has also requested a list of “any exhibits presented to the grand jury, whether marked or admitted, or unmarked and not admitted.” The defense does not cite any case law, rule, or statute requiring the State to provide the defense with materials presented before the grand jury. In any event, any exhibit presented to the grand jury has already been disclosed to the defense, except insofar as disclosure may be prohibited by A.R.S. § 13-2812 and/or any other statute and/or rule.

The State does not understand the request for grand jury exhibits that were “unmarked and not admitted.” If material was never marked into evidence nor presented to the grand jury, the grand jury could not have used such material in making its probable cause decision. The State asks the defense to clarify this request.

5. The State intends to use at trial any prior felony convictions of the defendant for impeachment purposes pursuant to Rule 609, Ariz. R. Evid., and/or for sentence enhancement under A.R.S. § 13-604. The defendant’s prior felony convictions now known to the State are:

(insert priors here)

The State will supplement this list if the State learns of additional prior felony convictions.

The State intends to prove any or all of the defendant’s prior conviction[s] by use of certified copies of the defendant’s prison records under Rule 902(4), Ariz. R. Evid., and/or by comparisons of the defendant’s fingerprints with those on his records. The State may also prove the defendant’s prior convictions by introducing certified copies of the sentencing minute (entry/entries) and/or by calling one or more witnesses who were present in court at the time of the conviction(s), such as the defense attorney, the prosecutor, or the adult probation officer. The State may also call a fingerprint examiner to take the defendant’s fingerprints and compare them with the prints in the defendant’s records. The State may also use copies of any presentence reports written during or after the proceedings in any other case involving this defendant.

6. At this time, the State will not seek to introduce any prior acts of the defendant to show motive, intent, knowledge, or for other purposes under Rule 404(b), Ariz. R. Evid. This may change depending on the defenses disclosed by the defense once the defendant has made the disclosure required by Rule 15.2, Ariz. R. Crim. P.

7. The State opposes the request for “Any material or information, **whether or not in recorded form**, in the possession or knowledge of the state or its agents, including the investigating police agency, . . . which tends to mitigate or negate the defendant’s guilt as to the offense charged, or would tend to reduce defendant’s punishment.” [Emphasis added.] The State asks the defense to clarify this request because, as

worded, it would be impossible to comply. The County Attorney has requested the Chiefs of Police to include in their police reports any evidence or information that is favorable to the defense. However, the State points out that witnesses testify from their memory, not from their written or recorded statements. See *State v. Jessen*, 130 Ariz. 1, 4, 633 P.2d 410, 413 (1981). If a police officer knows any relevant exculpatory information that has not been recorded in the police report(s) or elsewhere, the State cannot reasonably be expected to “produce” the officer’s unrecorded memory for the defense. The defense may interview any witness other than a victim and question that witness to determine if that witness has any exculpatory information not included in the police report(s). If the State learns of any such information during trial preparation, the State will promptly notify the defense and make an additional disclosure pursuant to Rule 15.6, Ariz. R. Crim. P.

7(a). The defense has asked for “all prior adult or juvenile felony convictions of witnesses which the prosecutor expects to call at trial.” Rule 15.1(a)(5), Ariz. R. Crim. P., requires the State to provide the defense with “all prior felony convictions of witnesses whom the prosecutor expects to call at trial.” [None of the witnesses in this case has any prior felony convictions.] OR [The adult felony convictions of the State’s witnesses are as follows:

Witness 1 Felony conviction(s)

Witness 2 Felony conviction(s) (and so on as necessary)]

Under A.R.S. § 8-208 (A), all juvenile delinquency court records are “open to public inspection.” In addition, under subsection (A)(5) of that statute, anyone may obtain “A summary of delinquency, disposition and transfer hearings” concerning any juvenile delinquency proceeding. Thus, the defense can obtain all juvenile history information for all witnesses through public records.

7(b). The defense requests “any adult or juvenile charges against witnesses which are pending or were dismissed after the commission of the offense,” citing *State v. Swinburne*, 116 Ariz. 403, 569 P.2d 833 (1977) and *State v. Torres*, 97 Ariz. 364, 400 P.2d 843 (1965). However, those cases do not deal with discovery, but with cross-examination. What those cases say is that courts should not limit the defense’s ability to cross-examine witnesses about any motive they may have to testify unfavorably to the defendant, regardless of whether such cross-examination may also show that the witness may have violated the law. *Torres*, 97 Ariz. at 366, 400 P.2d at 845; *Swinburne*, 116 Ariz. at 408, 569 P.2d at 838. Therefore, those cases do not support the defense’s position.

If any witness has been offered anything in return for testifying, that fact is disclosed under ¶ 7(e) and/or ¶ 7(f), below. As for any other witness, the defense has no right to discover the information the defense requests. The defense can interview all witnesses, other than victims, before trial and question each witness concerning any motive the witness may have to testify unfavorably to the defendant. The defense may

also cross-examine all witnesses who testify at trial to bring out any motive the witnesses may have to testify against the defendant.

7(c). Citing *State v. Van Den Berg*, 164 Ariz. 192, 791 P.2d 1075 (1990), the defense requests the State to provide information about whether any State's witnesses is now on probation or parole, or was on probation or parole at the time the defendant committed the offense(s). However, *Van Den Berg* does not support the defense's request, and the State opposes the request. *Van Den Berg* held that a request for discovery of the Aprior felony convictions≡ of prosecution witnesses includes a request for juvenile felony convictions. *Id.* at 195, 791 P.2d at 1078. In that case, the prosecutor refused to provide the defense with information about whether the State's witnesses had juvenile records, saying that even if they did have such records, those records could not be used to impeach the witnesses. The Court of Appeals held that the defense was entitled to use any witness's juvenile record, including possible probationary status, to impeach his testimony. When *Van Den Berg* was decided, juvenile records were confidential; however, as set forth in detail in & 7(a), above, the defense now has access to juvenile records of all witnesses. Therefore, *Van Den Berg* does not compel the State to specifically disclose the probationary status of any adult or juvenile witness.

Although criminal defendants have a due process right to disclosure, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), Athis right only extends to the disclosure of material evidence.≡ *State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d 593, 623 (1992). To be material, evidence must be admissible at trial. *State v. Dumaine*, 162 Ariz. 392, 406, 783 P.2d 1184, 1198 (1989). Misdemeanor convictions are not admissible as impeachment unless the misdemeanor involved an element of deceit or falsification. *State v. Malloy*, 131 Ariz. 125, 128-29, 639 P.2d 315, 318-19 (1981). Under & 7(a), above, the State has disclosed the adult felony convictions of all witnesses, as required by Rule 15.1(a)(5), Ariz. R. Crim. P. The defense has access to the juvenile felony records of all witnesses. Rule 15.1 does not require the State to disclose any misdemeanor convictions of any witness because that evidence is not material. Nor does Rule 15.1 require the State to disclose the probationary status of witnesses.

Further, the trial court may consider whether compliance with a discovery order would be unreasonable or oppressive. *State v. Tankersley*, 191 Ariz. 359, 368 & 32, 956 P.2d 486, 495 & 32 (1998). Requiring the State to determine all witnesses= probationary status would impose an unfair burden on the State. The State has no way to tell whether any witness is on city probation for a misdemeanor offense. It would be unreasonable to require the State to contact every possible jurisdiction and ask if every witness was on probation from that jurisdiction. The State therefore asks this Court to deny the defense's request to have the State determine the probationary status of all witnesses and provide that information to the defense.

7(d). The defense has also asked the State to provide copies of NCIC, LEJIS, ACJIS, and/or FBI records concerning any criminal history records of any and all witnesses. However, 28 U.S.C. § 534 prohibits law enforcement agencies from releasing such

information except to an authorized law enforcement agency. Therefore, the State cannot legally release those records to the defense. Similarly, A.R.S. § 41-1750(Q) prohibits law enforcement agencies from releasing such information except to an authorized law enforcement agency. Therefore, the State cannot legally release such criminal history records to the defense.

7(e). [There are no codefendants in this case.] OR [No codefendant has offered to cooperate with the State in this matter.] AND/OR [The State has not offered any codefendant anything to cooperate with the State in testifying in this matter.]

7(f). [The State has not entered into any plea agreement or contract of cooperation with any witness.] AND/OR [The State is not aware of any written contract of cooperation between any State's witness and any law enforcement agency.] The State has not offered any witness anything of value in connection with that witness's testimony. However, the State notes that the State may provide transportation and/or lodging and/or a per diem payment to witnesses and/or their parents or guardians to enable them to appear in court to testify as needed.

7(g). The defense has requested information concerning whether Any witness has any history of mental illness or drug addiction.≡ The defense has offered no justification for any such request, and the State opposes this request. The medical records of witnesses are confidential and the State does not have access to any witness's medical records [other than records of treatment for physical injuries and/or psychological counseling arising out of the charge(s) against the defendant]. The defense may interview non-victim witnesses and may ask these witnesses about their mental health history.

7(h). The defense has requested information concerning whether "the witness has taken a polygraph or has refused a polygraph examination." First, the State notes that this request is not limited in time, nor is it limited to polygraph examinations concerning this cause number. Even if this request is considered as being limited to this case, the defense cites no authority to support this request, and the State opposes it. Although criminal defendants have a due process right to disclosure, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), "this right only extends to the disclosure of material evidence." *State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d 593, 623 (1992). To be material, evidence must be admissible at trial. *State v. Dumaine*, 162 Ariz. 392, 406, 783 P.2d 1184, 1198 (1989). "Evidence regarding a polygraph examination is inadmissible absent a stipulation by the parties. *State v. Ikirt*, 160 Ariz. 113, 115, 770 P.2d 1159, 1161 (1989)." *State v. Tinajero*, 188 Ariz. 350, 353, 935 P.2d 928, 931 (App. 1997). In *State v. Rodriguez*, 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996), the Arizona Supreme Court noted that the Court has consistently held that polygraph evidence is not reliable and held that the defendant could not present evidence that the victim's co-worker had failed a polygraph test. Thus, the State asks this Court to deny the defense's request for information concerning any polygraph examination.

7(i). The State has not provided or promised anything of value to any friend or relative of any witness noted by the State, except that the State may provide transportation and/or lodging and/or a per diem payment to witnesses and/or their parents or guardians to enable them to appear in court to testify as needed.

8. No electronic surveillance is involved in this case.

9. [No search warrant was executed in this case.] OR [A search warrant was executed in this case. The State has provided the defense with copies of the warrant, the affidavit supporting the search warrant, and the return of the search warrant.]

10. No informants were involved in this case.

11. The defense demands "A list of all felony convictions of all disclosed defense witnesses." Rule 15, Ariz. R. Crim. P., does not require the State to disclose such information, except insofar as the State intends to use any such convictions to impeach defense witnesses. The State discloses the following felony convictions of disclosed defense witnesses whom the State intends to impeach with these convictions if they testify:

Defense witness Felony conviction (and so on if there are more)

As for juvenile records of any defense witnesses, see response to 7(a), above.

12. The defense seeks to discover all written or otherwise recorded statements of any State's witness "to victim assistance caseworkers and/or volunteers." There are no recorded statements of any State's witness to any such caseworker or volunteer.

The defense also requests "any statements made by the disclosed witnesses at any prior grand jury proceedings pertaining to the current charges against defendant, whether or not they resulted in a true bill." [There was no grand jury proceeding in this case.] OR [The transcript of the grand jury proceeding that led to the indictment in this case has been made available to the defendant under A.R.S. § 21-411(A). Under that subsection, reporter's notes that do not lead to issuance of an indictment are not routinely transcribed; such notes "shall be filed with the clerk of the superior court and impounded and shall be transcribed only when ordered by the presiding judge of the superior court." Therefore, if the defense seeks any grand jury records that did not result in a true bill, the defense must seek an order from the court to that effect.]

13. The defense asks whether any victim/witness assistant caseworker and/or volunteer has had any contact with any witness, and demands that the State disclose the names, addresses, and telephone numbers of "such caseworkers and/or volunteers." The defense cites no authority for this request, and the State opposes it because any communications between victims and victim/witness advocates are confidential. Article II, § 2.1(A)(1) of the Arizona Constitution gives crime victims the right "To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or

abuse, throughout the criminal justice process.” A.R.S. § 13-4430(A) provides that, except for compensation or restitution information, communications between a victim and a crime victim advocate are privileged “unless the victim consents in writing to the disclosure.” Further, A.R.S. § 13-4430 (B) states:

Unless the victim consents in writing to the disclosure, a crime victim advocate shall not disclose records, notes, documents, correspondence, reports or memoranda, except compensation or restitution information, that contain opinions, theories or other information made while advising, counseling or assisting the victim or that are based on the communication between the victim and the advocate.

In addition, A.R.S. § 13-4430(E) states:

If, with the consent of the victim, the crime victim advocate discloses to the prosecutor or a law enforcement agency any communication between the victim and the crime victim advocate or any records, notes, documents, correspondence, reports or memoranda, the prosecutor or law enforcement agent shall disclose such material to the defendant's attorney only if such information is otherwise discoverable.

Thus, conversations between any victim and a victim advocate are confidential. The victim advocate may not release privileged information, even to the prosecutor, without first obtaining the victim's written or oral consent; and even if privileged information is disclosed to the prosecutor, the prosecutor may not disclose such information to the defendant's attorney unless “such information is otherwise discoverable.”

A.R.S. § 13-4430(D) allows a defendant to move the court for disclosure of privileged information. “If the court finds there is reasonable cause to believe the material is exculpatory, the court shall hold a hearing in camera. Material that the court finds is exculpatory shall be disclosed to the defendant.” If the defense's position is that there is reasonable cause to believe that any such material is discoverable, the defense can move the Court for a hearing to determine if any disclosure is warranted.

14. The defense asks “disclosure of the names of any law enforcement agencies involved in the investigation or evaluation of the case.” The State has already given the defense copies of the police reports in this matter. Those reports contain the names of any agency or agencies involved in the investigation or evaluation of the case; in addition, the State notes that the Maricopa County Attorney's Office was “involved in the evaluation of the case” in terms of making the filing decision.

The defense further asks for “the names of any persons connected with those agencies . . . that were present at the scene of the crime during the arrest of the

defendant, and/or the execution of a warrant, the seizure of any evidence, and/or were present for the taking of any statements from any persons whether or not named in a police or investigative report.” The State has already provided the defense with the police reports in this matter. Those reports contain the names of all persons the State is aware were present at the time of any arrest, warrant execution, or taking of any statement. The State does not know if any officers or other persons, other than those named in the reports, may have been present at any such time. The defense can interview the persons named in those reports and determine if anyone else was present. If the defense informs the State that another person or persons were present, the State will endeavor to determine the identity of that person or persons and provide that information to the defense.

15. The defense requests that “non-lawyers” not make any “legal decisions” in this case. However, the defense cannot dictate or control how this office chooses to perform its duties. Under Ethical Rule 5.3, Rule 42, Rules of the Supreme Court, the attorneys in this office are legally and ethically responsible for the acts of their nonlawyer assistants. The State will comply with Ethical Rule 5.3 in performing its discovery duties.